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No. 85-1105

In the Supreme Court of the United States

OCTOBER TERM, 1985

JAMES D. CARTER, and
CHRISTOPHER MOSCATIELLO,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF

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REPLY BRIEF

The arguments which James D. Carter and Christopher Moscatiello rely upon are set forth in their Petition for a Writ of Certiorari. However, in its brief the government makes certain claims with regard to the record which are either misleading or inaccurate.[1] The purpose of this Reply Brief is to aid the Court to quickly focus upon these.

[1] There are additional errors in the Government's brief which are not relevant to the granting of the Petition in 85-1105. For this reason they will only be listed in this footnote, and not addressed in the text.

> "Petitioners sought rehearing, noting that according to the docket sheet and the district court's own statements, the nonsuppression motions were decided on December 21, 1983, rather than on Decem-

As is clear from a reading of both the Petition for Certiorari (No. 85-1105) and the Government's brief (pp. 5-8, 19-21),[2] the question that arises under the Speedy Trial Act is a function of dates, and what happened on which dates. The government represents that the trial judge considered "the non-suppression motions during the period between November 16 and December 21, 1983."[3] Moreover, it asserts "that the district court had determined prior to December 21 [1983] that it would deny the suppression motions."[4] The first statement is contradicted in the record; the second is pure speculation.

In the Memorandum on the Speedy Trial Motion the District Court wrote that it "did not *consider*. . .[the non-suppression motions] or take them under advisement until after. . .[he] had decided the motion to suppress on December

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ber 23, 1983, as both the district court and the court of appeals apparently had assumed." Government's Brief at page 7.

To the extent this suggests that the argument over the dates was *first* raised in the Petition for Rehearing, it is inaccurate. This issue was squarely raised in the initial appeal. See Petition (85-1105) at 4-5, A-65 to 67.

"Petitioners Murray, Carter and Moscatiello contend (No. 85-1118, Pet. 8-19) that the court of appeals erred in holding that the marijuana bales seen during the brief, warrantless entry into the warehouse could be admitted at trial because they would inevitably have been discovered during the course of the lawful warrant search." Government's Brief at 10.

Petitioner Moscatiello never joined in the search issue; only Carter joined in Michael Murray's Petition. See Petition (No. 85-1105) "Questions Presented," Question 2; Petition (No. 85-1118), p. 19 n.27.

Moreover, Carter sought to exclude two notebooks which were in plain view during the initial illegal search, not the marijuana. Petition No. 85-1105, A-76.

With respect to the accuracy with which the government characterizes the argument of the search issue, petitioner Carter relies upon the Petition and Reply Brief of Michael Murray (No. 85-1118).

[2] All references are to the typescript copy, since the printed copy has not yet been received.

[3] Brief for Government, typescript, at page 20.

[4] Brief for Government, typescript, at page 21.

23, 1983."[5] (emphasis added). If the judge who made the rulings so states, the government can not represent that he considered these "motions during the period between November 16 and December 21, 1983."[6]

Turning to the government's conjecture that the order denying the suppression motions was decided on December 21, and not December 23 as it recites, the government would have this Court accept its guess that it took the trial court "more than two days" to write this seventeen page opinion "and therefore that the district court had determined prior to December 21 that it would deny the suppression motions."[7] It is just as likely that the District Court carved out time on December 23, and composed the opinion that day. Another possibility is that the judge resolved in his own mind on the 23rd that he was going to deny the motions, and spent the next few days drafting the opinion and having it docketed. The record reflects that while the decision was dated December 23, it was not docketed until December 27, 1983.[8] Under this scenario, the Court made its decision on December 23, which was a Friday in 1983, worked on the decision on the weekend, had it typed on Monday, the 26th, and docketed it on December 27th. The point here is not that one speculation is more reliable than the other, but that the Court cannot ignore the question raised by this case by relying on conjecture.

The government's suppositions are the latest effort to avoid the Speedy Trial issue in this case. The District Court and the Court of Appeals refused to acknowledge the dates the non-suppression motions were decided in order to evade the issue. See n.12 *post*. Before this Court, the government admits that there is no record support for the lower court's findings, see n.12, but then creates several other fictions. No matter how

[5] Petition (No. 85-1105) A-49. This language was quoted in the body of the Petition (No. 85-1105) itself. See page 4.

[6] Brief for Government, typescript, at page 20.

[7] Brief for Government, typescript, page 21.

[8] See Petition (No. 85-1105), A-61 and 64.

frantic the effort to tailor the facts, the Emperor is all too visibly without clothes: the 195 days from May 9 until November 21, 1983[9] were excluded solely "to avoid a violation of the Act."[10]

Nor do the underlying facts transform this issue into a "fact-bound question."[11] The principal importance of the factual assertions by the District Court, the Court of Appeals, and the government is that they do not agree with each other,[12] and that all of them are contradicted by the record. When taken together, they demonstrate that this Court is being asked to endorse the position that so long as the language of the Speedy Trial Act is recited, a Court can exclude whatever number of days is needed "to avoid a violation of the Act." The conclusion stated in the Petition (No. 85-1105) is underscored by the arguments put forth in the Government's Brief in Opposition:

> "The practices approved in the present case will create a gaping loophole in the Act that will undermine its very purpose. This question is of such substantial importance to the administration of the Speedy Trial Act that this Court should exercise its discretion in favor of granting certiorari to review and reject this practice now."[13]

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[9] Petition (No. 85-1105), pages 7, 10.

[10] Petition (No. 85-1105), A-84 and A-87.

[11] Brief for Government, typescript, page 19.

[12] E.g. the District Court held that it did not *consider* the non-suppression motions "until after. . . December 23, 1983." Petition (No. 85-1105), p. 4 and A-49. The Court of Appeals held that these non-suppression motions "were not decided until on or after December 23, 1983." Petition (No. 85-1105) p. 8, and A-5. Finally, in its Brief in Opposition the government acknowledges that these motions *were decided* "on December 21, 1983, rather than on December 23, 1983, as both the district court and the court of appeals apparently had assumed." Typescript Brief at page 7. See also pages 5 and 20.

[13] Petition (No. 85-1105), p. 12.

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